



June 12, 2001

Mr. William T. Buida
Supervising Attorney
Texas Department of Human Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2001-2476

Dear Mr. Buida:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 148306.

The Texas Department of Human Services (the "department") received a request for "all complaints, survey documentation, and reports received or published since October 2000 regarding Westminister House, Kingwood Village Estates – Kingwood, Texas." You state that you have released some of the requested information. You claim that the remaining information, submitted as exhibits "A" through "F," is excepted from disclosure under section 552.101 of the Government Code. We have considered your claims and reviewed the submitted information.

We first note that the department failed to request a ruling from this office within the ten business day period required in section 552.301 of the Government Code.

Subsections 552.301(a) and (b) provide:

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

Because the request for a decision was not timely received, the requested information is presumed to be public information. Gov't Code § 552.302.

In order to overcome the presumption that the requested information is public information, a governmental body must provide compelling reasons why the information should not be disclosed. *Id.*; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ); see Open Records Decision No. 630 (1994). Compelling reasons exist when the information is made confidential by law or affects the interest of a third party. Open Records Decision No. 630 at 3 (1994). In this instance, you raise section 552.101 of the Government Code as an exception to required public disclosure. The application of section 552.101 presents a compelling reason to overcome the presumption of openness.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You assert that some of the documents at issue are excepted from disclosure under section 552.101 of the Government Code in conjunction with section 142.009(d) of the Health and Safety Code. Section 142.009(d) provides as follows:

The reports, records, and working papers used or developed in an investigation made under [Chapter 142] are confidential and may not be released or made public except:

- (1) to a state or federal agency;
- (2) to federal, state, or local law enforcement personnel;
- (3) with the consent of each person identified in the information released;
- (4) in civil or criminal litigation matters or licensing proceedings as otherwise allowed by law or judicial rule;
- (5) on a form developed by the department that identifies any deficiencies found without identifying a person, other than the home and community support services agency;
- (6) on a form required by a federal agency if:

(A) the information does not reveal the identity of an individual, including a patient or a physician or other medical practitioner;

(B) the service provider subject to the investigation had a reasonable opportunity to review the information and offer comments to be included with the information released or made public; and

(C) the release of the information complies with any other federal requirement; or

(7) as provided by Section 142.0092.

We have reviewed exhibits "A," "B," "C," "D," and "E" for which you assert section 142.009(d). These records constitute "reports, records, and working papers used or developed in an investigation" under section 142.009(c) of the Health and Safety Code. Furthermore, you have provided no information that would allow us to conclude that any of the exceptions to confidentiality in section 142.009(d) apply in this instance. We therefore conclude that the department must withhold exhibits "A," "B," "C," "D," and "E" from the requestor pursuant to section 552.101 of the Government Code.¹

Exhibit "F" includes a state form contemplated by section 142.009(d)(5) of the Health and Safety Code. Exhibit "F" therefore must be released, with the exception of information made confidential under section 552.101 of the Government Code in conjunction with section 159.002 of the Occupations Code. Section 159.002 provides in relevant part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter . . . may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

¹ With regard to exhibit "E", section 142.009(d)(6) of the Health & Safety Code permits the release of chapter 142 investigative information on a form required by a federal agency if the information does not reveal the identity of an individual and if the service provider under investigation had an opportunity to review and offer comments on the document. However, because you inform us that the service provider has not had a chance to review and comment on exhibit "E," the document is confidential. Health & Safety Code § 142.009(d)(6)(B).

For the most part, we agree that the information you have redacted in exhibit "F" must be excepted from required public disclosure under section 159.002. However, we have marked some information that you have redacted in exhibit "F" that is not information made confidential by section 552.101 in conjunction with section 159.002 of the Occupations Code. This information must be released. In addition, we have marked additional information which must be redacted under section 159.002 prior to the release of exhibit "F."

You also marked exhibit "F" to indicate that portions of the information are protected from disclosure based on a right to privacy. Whether constitutional or common law privacy, you do not indicate. In either case, as the document contains no information that identifies an individual, we conclude that the department need not withhold any information on privacy grounds.

In summary, exhibits "A," "B," "C," "D," and "E" must be withheld in their entirety under section 142.009(d) of the Health and Safety Code. Exhibit "F" must be released, with the exception of information excepted from required public disclosure under section 552.101 of the Government Code in conjunction with section 159.002 of the Occupations Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839.

The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Kay H. Hastings
Assistant Attorney General
Open Records Division

KHH/DKB/seg

Ref: ID# 148306

Encl. Marked documents

cc: Mr. Larry Drummond
8111 Whirlaway Elm Drive
Humble, Texas 77346
(w/o enclosures)